

Protest of ) Date: February 2, 1990  
KORBY CONSTRUCTION COMPANY )  
Solicitation No. 020312-89-A-0047 ) P.S. Protest No. 89-79

### DECISION

Korby Construction Company (Korby), timely protests the contracting officer's determination that its proposal under Solicitation No. 020312-89-A-0047 was technically unacceptable, and, as a result, not eligible for further consideration.

Solicitation No. 020312-89-A-0047, issued June 9, 1989, by Procurement & Materiel Management, Anchorage Field Division, sought proposals to remove and dispose of two underground fuel storage tanks at the Fairbanks General Mail Facility (GMF). Proposals were to be submitted by June 27. An amendment extended the opening date to July 10. On July 11, the proposals were opened. On that date, Korby, the low offeror,<sup>1/</sup> was asked to submit construction cost estimates to support its proposal.<sup>1/</sup>

Korby's cost estimate was received July 14 and sent to the architect/engineer firm (A/E) assigned to the GMF project for review. By letter dated July 20, the A/E recommended that Korby's proposal be "disqualified" since it was "not consistent with the level of effort required for project execution." The A/E made four specific comments on Korby's estimate. He found that the breakdown item for demolition was confusing and that the price of tank removal was far below the appropriate cost. He also concluded that both the excavation and back fill quantities were substantially below the levels required.

Korby and Postal Service procurement officials were in telephonic contact during this period. Korby indicates that there were several conversations between July 11 and July 17, and another conversation on July 21. Korby indicates that it confirmed the amount of its offer twice and generally discussed the various costs of performing the

<sup>1/</sup>Korby submitted an offer of \$23,901.29. The next low offer was \$41,994.00.

<sup>2/</sup>Procurement Manual (PM) 4.1.4.b provides, in pertinent part:

Price or cost analysis is necessary to determine the reasonableness and validity of a proposed price or cost estimate, and to assist in determining an offeror's understanding of the work and ability to perform the contract.

work.

On July 24, the contracting officer determined that Korby's offer was unreasonable and that as a result, Korby was disqualified from further consideration. A memorandum to the file, dated July 25, summarizes the conclusions reached by the A/E and also notes that Korby's offer was approximately \$72,000 below the Postal Service's estimate.

On July 26, a "Notice of Intent to Award" letter was issued to Earth Movers of Fairbanks, Inc., the third low offeror. On the same date, a letter was sent to Korby advising it of the award to Earth Movers of Fairbanks, and noting that Korby's apparent low offer was "disqualified." On August 2 a representative of Korby called the Field Division asking for further information about the content of the letter. In response to this telephone call, the contracting officer sent to Korby, via certified mail, a copy of the solicitation and the evaluation of the A/E.

Korby received the contracting officer's letter on August 7, and responded in a letter dated August 8, which was received by the contracting officer August 14.<sup>17</sup> On September 7, the contracting officer issued a decision denying the protest as obviously without merit. The decision stated that the contracting officer had determined, "based upon professional review by Postal Service consultant, that your construction cost breakdown and subsequent telephone conversations did not express an apparent understanding of the Scope of Work or the level of effort required to execute the project." This protest followed on September 22.

In its protest, Korby requests an "investigation" of the proposal that Korby submitted for the GMF project. The protester asserts that the contracting officer's determination was "premature and corrupt, in its process," in that it was made while Korby was still "processing phone calls with additional backups of its bid proposal" and forwarding information to the contracting officer.

In his statement, the contracting officer relies upon the review of Korby's cost estimate by the contracting officer, the project manager and the contract administrator, as well as the professional evaluation of the estimate that was provided by the A/E.

In comments filed in response to the contracting officer's report, Korby asserts that the report makes no mention of the numerous telephone conversations between representatives of Korby and of the Postal Service. Korby states that it responded to a number of questions regarding its costs and the amount of its offer, and also confirmed the amount of its offer twice. Korby notes that the A/E did not request a meeting with

<sup>3/</sup> The August 8 letter did not contain the word "protest," but did express dissatisfaction, in that it took issue with a number of conclusions contained in the A/E's analysis. It also requested corrective action, in that it asserted that the rejection of its "bid" was in error and should be investigated. By expressing dissatisfaction and requesting corrective action, Korby's letter constituted a protest. Electric Power Systems, P.S. Protest No. 85-44, September 25, 1985; International Mail Systems, P.S. Protest No. 84-13, July 2, 1984. In a subsequent letter, received by the contracting officer on August 28, Korby expressly protested the determination; however, as Korby knew of the information on which its protest is based not later than August 7, a protest received on August 28 would be untimely under PM 5.4.c.

Korby, and suggests that the A/E may not have been provided with information that Korby had furnished Postal Service personnel. Korby requests damages in the amount of half of its offered price.

### Discussion

The materials submitted by the contracting officer make it clear that Korby was initially determined to be within the competitive range, but was later eliminated from the competitive range on the basis of the conclusion that it failed to demonstrate an understanding of, and ability to perform, the work called for by the solicitation. The thrust of Korby's protest is that it was improper for the contracting officer to take this action before the process of verification and reference-checking was completed. The Postal Service Procurement Manual, under which this procurement was conducted, makes it clear that "an assessment of each offeror's ability to accomplish the technical requirements" is to be part of the technical evaluation process. PM 4.1.4.c.2. An offeror once placed in the competitive range may be eliminated from the competitive range when further review indicates that it has no substantial chance of receiving award. See DAVSAM International, Inc., Comp. Gen. Dec. B-228429.5, March 11, 1988, 88-1 CPD & 252.

Korby does not indicate, either in its protest or in its comments, in what way the contracting officer's determination was premature. Korby does indicate, however, that it was still in the process of confirming prices or quotations from suppliers at the time the contracting officer eliminated it from further consideration, and that it confirmed its offer's price on more than one occasion. Although the sequence of events led to some wasted effort on Korby's part, the further confirmation that Korby was endeavoring to provide is unrelated to the basis for the contracting officer's conclusion that Korby failed to understand the contract work.

The A/E's analysis on which the contracting officer relied contained four specific comments, only one of which refers to Korby's costs as shown in its breakdown. Thus, no verification or confirmation by Korby, whether provided orally or in a written verification, would be relevant to three of the bases for the contracting officer's concern about Korby's technical capabilities. Korby's repeated confirmation of its offer price tends to confirm, rather than undermine, the basis for the contracting officer's determination.

Although Korby does not take issue with the A/E's analysis in its protest, it responds to three of the four specific points in a letter to the Postal Service dated August 31. Korby suggests that it should have been consulted on one item, that it backed up its costs, and that, at least as to one item, the A/E's criticism is a "discrimination against bidding." These comments do nothing to establish that Korby had an understanding of the project work, much less that it had demonstrated an understanding of the work to the contracting officer at the time he made his determination.

To accept Korby's assertion that the contracting officer's determination was improper as premature would be to require the contracting officer to complete a process irrelevant to the determination that eliminated the offeror from the competitive range, despite the fact that the offeror had no reasonable chance of award. This could be manifestly

unfair to offerors, as they could be encouraged to expend effort indefinitely on a lost cause. See PM 4.1.5.g.2(c).

Although Korby makes repeated references to bias, and asserts that the determination was "corrupt, in its process," it offers nothing more than conclusory allegations, unsupported by any specifics.<sup>4/</sup> By offering no evidence in support of its allegations, Korby falls far short of the well-established requirement that such allegations must be proven by the protester by "well-nigh irrefragable proof" of malicious and specific intent to harm the protester, not merely by inference or supposition. In the absence of such proof, contracting officers are presumed to act in good faith. York International Corporation, P.S. Protest No. 89-77, January 19, 1990; see also Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985.

The protest is denied.

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Office of Contracts and Property Law    **[checked against original**

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<sup>4/</sup> Korby's allegations could be viewed as merely more colorful expressions of its view that the determination was improper because it was made before Korby completed its verification process. However, we have assumed, for purposes of this decision, that Korby intended to state an independent ground for its protest.